Supreme Court, U.S.
FILED
JAN 21 1999
CLERK

(6)

No. 97-1754

In The

Supreme Court of the United States

October Term, 1998

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

v.

JUAN ANIBAL AGUIRRE-AGUIRRE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether this case should be remanded because the facts underpinning the Board of Immigration Appeals' and Court of Appeals' decisions are not the facts of the case.

2. Whether the Court of Appeals erred in reversing the decision of the Board of Immigration Appeals, which held that Respondent is barred from eligibility for the relief of withholding of deportation by operation of the "serious nonpolitical crime" exception of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2)(C)(1994).

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STATEMENT

Juan Anibal Aguirre-Aguirre applied for asylum and withholding of deportation before an immigration judge (IJ) in Las Vegas, Nevada, where he still lives and works. AR 120. Mr. Aguirre is a native and citizen of Guatemala. At the time of his deportation hearing in April 1995, he was 25-years old. AR 42, 120. He was born and lived in Penaivia Aguas Blancas in the state of Jutiapa. *Id.* He graduated from college with a degree in accounting. AR 70. He worked in that field for only one month before fleeing Guatemala. *Id.*

Mr. Aguirre's Political Activities in Guatemala and Fear of Being Deported to Guatemala

Mr. Aguirre sought asylum and withholding of deportation in the United States because he was afraid he would be murdered or gravely injured if he were forced to return to Guatemala. AR 127, 128, 129. The United States is the safest place he could think of. AR 133.

Because Mr. Aguirre is young, and because of his active involvement in political groups in Guatemala, he has reason to fear that his life would be in danger. Among other things, he was threatened by guerrillas who he is certain have the capability and willingness to hurt him. *Id.*

Mr. Aguirre received threats from both sides in the Guatemalan conflict: from the government and from guerrillas. AR 127-129, 131. He believes that both the Guatemalan government and the guerrillas fighting the government are a threat to his life. *Id.* Both of these groups have the ability and have shown a willingness to brutally torture and murder anyone they even suspect of participating in activities that each group considers to be in opposition to them. AR 129.

Mr. Aguirre was vice president of the "Directiva," the student body at his school, for six years. AR 75, 77. This was a high profile position, so that most students and

faculty and people in the university knew that he was in that position; this was true also because they were the ones who were electing him. AR 78, 80. His responsibiiities included notifying all the members of the demonstrations and being on guard to observe how well the demonstrations went. AR 75, 78. The student body also worked with the faculty to receive information and pass it around to the rest of the people. *Id.*

In 1988, at the age of 19, Mr. Aguirre became involved with the Sindicato Estudiantil (student union) (SE). AR 127. This was a national group that was active on many campuses and in many areas in Guatemala. AR 127, 79. Mr. Aguirre was active with this group until he was forced to flee Guatemala in late 1992. AR 130.

The SE kept undercover and were very secretive. AR 127. In Jutiapa there were 22 local units, or cells, with over 1,000 members in that Department. AR 71, 127. Mr. Aguirre was a leader of the Agua Blanca group of the SE in Jutiapa. AR 127. As a leader, he would receive information for distribution to other members in the Agua Blanca cell. AR 71, 127. He would contact a core of about 15 members who would notify the rest of the Agua Blanca group of their plans. *Id.*

The SE viewed itself as a moderating force. AR 127. Their purpose and goal was to cause civil unrest against the government for government policies or activities that infringed too greatly on the rights of the people. AR 130. The SE would set up roadblocks, burn tires and buses and generally create civil disturbances. AR 127. They also would help organize strikes when they thought it was necessary to protest government policy, action, or inaction.

When a body of someone who had been killed was discovered, the SE would go out and strike, burn buses, break windows, or attack police cars. AR 72. The SE protested the fact that the government never investigated deaths or disappearances. AR 72.

Mr. Aguirre and other group members began receiving anonymous death threats, telling them to stop their activities or suffer the consequences. AR 73-74, 127, 131. He believes that the threats were from right-wing government agents because the notes also told him "to be a good citizen" and because the last two were on official government stationary. AR 74, 127, 131. In fact, five members of the SE were found dead in different areas through a period of six months before Mr. Aguirre fled Guatemala. AR 80-81. The government never investigated the killings, so people suspected the government was responsible. AR 8. However, apparently in one case it was the guerrillas who were responsible. AR 81, 83. That person was found dead in Guatemala City. AR 83.

Mr. Aguirre also was personally threatened by people he believes were guerrillas. AR 127, 131. The guerrillas would know all about the SE's activities, because they have people who infiltrate the groups. AR 81. In June 1992, Mr. Aguirre was in a soccer field with his friend Carlos Gonzales and two other friends. AR 127, 131. Three men who were dressed in guerrilla uniforms approached them and told them to cease their activities or they would suffer the consequences. AR 81-82, 127, 131. The guerrillas asked Mr. Aguirre and the other three to support them but they refused. AR 82.

It is commonly understood in Guatemala that the "consequences" are death when the threat is received from guerrillas or a member of the military. AR 131. The guerrillas viewed the SE as competitors, although their goals were similar in that their target was the government. AR 82, 127. It was clear to Mr. Aguirre that the guerrillas were referring to his activities in the SE. AR 131. Mr. Aguirre believes that of course the guerrillas could kill him and that they would kill him. AR 82.

The guerrillas also said that they suspected that Mr. Aguirre was in the military, which would make him the guerrillas' target. AR 127. In fact, Mr. Aguirre had been forced to join the Military Reserves. AR 130. As such, he

was required to carry the military identification with him at all times. AR 127. The guerrillas frequently established roadblocks where they would check for military identification. Anyone caught with that identification would be in danger. *Id.* If the guerrillas ever found him with the military identification they would kill him. AR 85.

At the soccer field, the guerrillas did not ask for identification or search Mr. Aguirre but they threatened him because of his involvement with the SE and his suspected involvement in the military. AR 127-128. Mr. Aguirre does not believe that the Guatemalan government is capable of controlling the guerrillas. AR 131.

Mr. Aguirre was forced to join the Military Reserves to avoid being drafted into full time military service. AR 130. He served three times a week, 12 times a month, and was on active duty for one year. AR 85.

Just before Mr. Aguirre fled Guatemala he was arrested and held for three hours until he could prove that he had fulfilled his military obligation. AR 131. He was questioned, forced to exercise, and his hair was shorn off. *Id.* He was released after proving that his military commitment had been met. *Id.*

Mr. Aguirre had reason to fear the consequences of being in the military. His uncle, Edgar Rolando Aguirre-Castillo, was in the military (Mr. Aguirre is uncertain of the dates). AR 130. In August 1989, he was brutally murdered by the guerrillas while traveling with Felipe Antonio Zamorra de la Cruz, former national deputy of the police in the narcotics division. *Id.* Mr. Aguirre-Castillo had been in the United States under temporary protected status but returned to Guatemala for unknown reasons. He was murdered when the guerrillas stopped his car and discovered who the men were. *Id.* Mr. Aguirre believes that his uncle was murdered by the guerrillas because of his status as a former military man. AR 131, 84. No one has ever been brought to justice for this crime. *Id.*

Mr. Aguirre also was a member of the UCN (Union del Centro Nacional). AR 130, 85. The UCN is a right-wing political party that at that time was headed by Jorge Carpio Nicolle, who was assassinated in late 1993 (after Mr. Aguirre fled Guatemala). Mr. Aguirre was a rank-and-file member of the UCN from early 1990 until he left Guatemala in late 1992. AR 130. Mr Aguirre's father, Juan Francisco Aguirre, was a UCN member for eight years. AR 130. Mr. Aguirre himself participated in organizing and attending political rallies for their candidates and also demonstrations against the government. AR 130, 85. He also helped recruit new members to the party. AR 86.

A few days before Mr. Aguirre fled Guatemala, a government official threatened him because of his activities with the UCN. AR 86, 87. His name was Julio Palmanale; he was a member of the Guatemalan Congress. AR 86. He told Mr. Aguirre to stop recruiting people to join the UCN and to join his party instead. Mr. Palmanale was the highest official there; he said that if Mr. Aguirre did not do what he was being asked to do, he could count on the consequences and would see what would happen to him. *Id.* Mr. Aguirre saw this as a threat, and believed he would be harmed. AR 87. About a week later, he fled Guatemala for the United States. AR 87.

Also around the same time, Mr. Aguirre was informed by Ferdy Barganza, a former secretary in the Congress in Guatemala City, that five people in each Department were earmarked for execution. AR 128, 88. Mr. Berganza was a big politician and he knew everything there. AR 89. Mr. Berganza was also Mr. Aguirre's friend; Mr. Aguirre had been on his football team, and Mr. Berganza was very fond of him. AR 89. For these reasons, he gave Mr. Aguirre the warning. *Id.* Mr Aguirre feared that he might be among those targeted to be killed, and he knew that the government and the military both were capable of such action, so he fled Guatemala. AR 128, 89. In fact, he learned after he left that one of the leaders in his Department had been executed. *Id.*

In addition, Mr. Aguirre's cousin, Juvenio Aguirre, was a member of the SE until his death on December 30, 1989. AR 130. He was active in a cell and died during a street demonstration organized by the SE. AR 130, 131. Mr. Aguirre never learned the cause of his death. His companions removed his body quickly and no autopsy was ever performed, to Mr. Aguirre's knowledge. *Id.* However, the government police often opposed the SE, and Mr. Aguirre believes they killed his cousin during that demonstration.

After coming to the United States, Mr. Aguirre received a letter from the director of his former school, informing him that unknown people had been at the school asking where they could find him. AR 128, 89-90. The school director advised Mr. Aguirre to stay out of Guatemala in order to ensure his safety. AR 128, 90, 146-48.

Mr. Aguirre knows that many people have been killed in his country, and the killing has not stopped. AR 129. The government either will not or cannot do anything to prevent it. Some people suspect the government and the military may be cooperating in the illegal activities. *Id.* He is afraid to return because he fears being murdered. *Id.* Mr. Aguirre is afraid that either the guerrillas or the government or a secret group associated with the government might kill him. AR. 90. This is a very valid fear in Guatemala. AR 129.

The Hearing Interpreter and Transcriber Errors

Mr. Aguirre testified in Spanish at his hearing; an INS-provided interpreter interpreted the English questions to Mr. Aguirre and interpreted his Spanish answers for the court and attorneys. Neither the IJ nor Mr. Aguirre's attorney understood Spanish.

As typical in immigration court proceedings, no court reporter was present. The IJ taped the hearing and a transcript of the tape was made later, by someone who had not been present at the hearing. The transcript was

made part of the administrative record; it is the transcript that the Board of Immigration Appeals (BIA) and Court of Appeals used, and is the same transcript the INS has cited in its brief.

After the INS filed its Petition for Certiorari in this case, counsel for Mr. Aguirre obtained a copy of the hearing tape from the INS through the assistance of the Solicitor General's office. The Solicitor General lodged a copy of the hearing tape with this Court.

At Mr. Aguirre's attorney's request, a certified federal court interpreter listened to the hearing tape. He found numerous errors and omissions in the translation from English into Spanish and from Spanish into English, and some errors in the transcription. His statement, and his corrected transcript of the most relevant sections, were lodged with this Court on September 23, 1998.

Counsel for Mr. Aguirre filed with the BIA a Motion to Remand on December 14, 1998, requesting that the case be remanded to the IJ for a new merits hearing because of the mistranslation and mistranscription in the original hearing. The motion details the most relevant errors and omissions made by the interpreter and transcriber. The motion is pending. A copy of the Motion is attached in Respondent's Appendix, hereto. App. 1.[1]

The Immigration Judge's Decision

In his decision, the IJ said he had observed Mr. Aguirre's testimony and demeanor and found him to be "a credible witness worthy of belief." AR 51. The IJ found that because of Mr. Aguirre's political opinions and activities in Guatemala, Mr. Aguirre meets the requirements for asylum and also for the higher standards for withholding of deportation. AR 43. There is sufficient objective evidence to show that Mr. Aguirre was very involved in political activities and did receive threats from the

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[1] App. is the Respondent's Appendix, attached hereto.

guerrillas and also from the government because of his activities.

After a detailed recitation of the facts from the record, the IJ rejected the INS's suggestion that Mr. Aguirre was a criminal or a terrorist. "No one was ever hurt" the IJ found. AR 54. "His acts were politically motivated" *Id.* All the threats and acts by the government and others were based on political grounds. *Id.* Also, the IJ said, "Guatemala is a very violent country with a long history of cruelty, civil strife, and human rights violations by the government, by right wing government support groups, and by the guerrillas. His activities and those of his fellow students must be viewed in this perspective." AR 54-55.

The IJ concluded that after considering all of the evidence, including the acts of property damage and vandalism and perhaps assault connected therewith, he nevertheless believed that those factors were outweighed by the favorable factors. He granted asylum as a matter of discretion, and also granted withholding. AR 55.

The BIA's Decision

The INS appealed the IJ's decision to the BIA.[2] The BIA did not disagree with the IJ's credibility determination. AR 6-10. It did not discuss or reach the merits of either the asylum or withholding applications. The BIA rejected the INS's argument that Mr. Aguirre was a terrorist or a danger to the community. AR 9. It found that the criminal nature of Mr. Aguirre's acts outweighed their political nature and that consequently he is barred from withholding. *Id.* The BIA did not hold that Mr. Aguirre had committed any crime, nor that any such crime was "serious." AR 6-10. It did not find that there were

[2] Mr. Aguirre's then-attorney did not file a brief at the BIA and filed a motion to withdraw as counsel two weeks after the BIA issued its decision. AR 2-4.

"serious reasons for considering" the withholding exception applied. *Id.* It also did not discuss or reach the question of whether Mr. Aguirre's fear and risk of harm upon deportation to Guatemala should be considered. *Id.*

SUMMARY OF ARGUMENT

Due process dictates that this case be remanded to the agency for a new merits hearing on Mr. Aguirre's applications for asylum and withholding. Crucial facts on which the BIA and Court of Appeals based their decisions were incorrect because the INS hearing interpreter and transcriber made serious errors of omission and commission. The INS has made the degree and extent of Mr. Aguirre's conduct pivotal in this case, and the errors and omissions describe that conduct. Specifically, the "official" record reads as if Mr. Aguirre admitted having committed violent conduct toward civilians that he did not in fact admit. It also reads as if he twice failed to deny the charges of committing this violent conduct. Both times the hearing interpreter failed to interpret crucial words, so that the questions Mr. Aguirre was asked were not the questions he heard or answered.

The INS cannot argue that Mr. Aguirre "waived" objection to these errors. He had no knowledge of them and could not reasonably have discovered them. Respondents in immigration court proceedings do not receive the tapes of their hearings. The errors and omissions were caused by INS employees, acting within their official capacities, not by Mr. Aguirre. The INS cannot proceed to deport Mr. Aguirre to Guatemala when it knows that pivotal facts upon which it bases that deportation may not be true.

The Court can proceed to a decision on the merits if it affirms the Court of Appeals, which itself ordered a remand to the agency. Respondent filed a motion to remand with the BIA seeking a new IJ hearing. That motion is pending.

If the Court decides this case on the merits, it should find that deference to the INS's litigation position is not warranted. The BIA never has adopted a precedent decision forbidding consideration of the risk or degree of persecution the withholding applicant fears in assessing the serious nonpolitical crime exception to withholding. Nor has the Attorney General ever promulgated such a regulation. The BIA did not even reach the issue in this case. Therefore, there is no official agency position to which the Court should defer. The INS position is only that, a litigation position, to which deference is not warranted.

Deference to the BIA decision in this case is not warranted for numerous reasons. The BIA has been inconsistent when applying this and related exceptions to the withholding statute. The BIA's decision here also contradicts its own precedent that an IJ's decision regarding the accuracy, reliability and truthfulness of a witness is to be given significant deference. The BIA decision here also was cursory and poorly reasoned. It was not context-specific nor sensitive to Mr. Aguirre's need for safe haven.

Affirmance also is appropriate on the merits. That is, there is a statutory standard for evaluating the serious nonpolitical crime exception, and the IJ and the court of appeals correctly followed that standard, but the BIA did not. The statute requires that each element be separately considered and that there be "serious reasons" for finding each element to be satisfied. To be consistent with the mandatory nature of withholding and with the purpose and structure of the statute, the INS must carry the initial burden of proving a prima facie case with respect to each element. As the IJ found, the INS did not meet that burden here, and none of the elements was established. Specifically, the actions in which Mr. Aguirre was involved in Guatemala were "political" and he did not commit any "serious crime" in the context in which they

occurred. The IJ also appropriately considered the risk to Mr. Aguirre if he is deported to Guatemala.

It is appropriate to consider the threat to the withholding applicant's life or freedom when assessing the serious nonpolitical crime exception. That is, if a refugee will be forcibly expelled to face death, torture, or severe mistreatment because of his or her political activities, the crime that justifies the expulsion must be very grave. The drafters of the Convention anticipated that this "balancing" would be necessary, and the Handbook's balancing test is consistent with and memorializes that intent. The Court of Appeals appropriately directed the BIA to reassess Mr. Aguirre's applications with these statutory standards. The Court of Appeals did not direct a result, but only remanded for the BIA to reconsider Mr. Aguirre's application.

ARGUMENT

I. THIS MATTER MUST BE REMANDED TO THE IMMIGRATION JUDGE FOR A NEW MERITS HEARING BECAUSE CRUCIAL FACTS ARE IN DISPUTE AND THIS COURT DOES NOT FIND FACTS IN THE FIRST INSTANCE

A. The INS-Provided Interpreter at the Original Hearing Made Crucial Errors Of Omission and Commission Such That Mr. Aguirre's Testimony Was Mistranslated and He Did Not Hear, Understand, or Answer the Questions He Was Asked.

As detailed in the Motion to Remand filed with the BIA, the hearing tape reveals that the INS-provided hearing interpreter made many significant errors, and that the tape transcriber compounded the problem by making

others.[3] Among many other errors and omissions, the hearing interpreter translated Mr. Aguirre's testimony to say that he and his compatriots would "stone" the bus passengers before the buses were burned. This is not what Mr. Aguirre testified. He testified that no one was hurt during the bus burnings because the protesters would stop the buses, get all the people off, and throw rocks at the buses.

Moreover, in subsequent questions, the transcript shows that the TA twice asked Mr. Aguirre about "throwing rocks" at people and he did not deny it. The reason he did not deny throwing rocks at people was because both times, the interpreter did not ask him that part of the question. He never heard that he was being accused of throwing rocks at people. And because only the questions the TA asked appear in the transcript and not the Spanish questions actually put to Mr. Aguirre, a reader of the transcript believes that Mr. Aguirre did not deny committing the violent conduct of which the TA accused him.

B. Due Process Would Be Violated By Proceeding With This Case When The INS Knows That Its Version of Pivotal Facts May Be Wrong

The INS bases its entire case on Mr. Aguirre's testimony. The INS does not deny that the hearing interpreter made errors of commission and omission during that testimony, resulting in an "official" record that contains numerous errors.

In his brief in opposition to the Petition for Certiorari, and again in the corrected transcript lodged with this Court, and again in his Motion to Remand, Mr. Aguirre detailed the errors and omissions the interpreter and transcriber made. In its reply brief at the certiorari

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[3] INS hearing interpreters are not necessarily certified as court interpreters. *See El Rescate Legal Services, Inc. v. EOIR*, 959 F.2d 742 (9th Cir. 1992).

stage, the INS disputed one element of the corrected transcript but did not dispute that the interpreter and transcriber had made the other errors Respondent detailed. Primarily, the INS argued that it was too late for Mr. Aguirre to point out the errors, and that the disputed facts did not matter.

The INS has built its case on its characterization of Mr. Aguirre's conduct, derived from the inaccurate interpretation, without so much as noting any dispute about its accuracy. But further, the INS grossly and misleadingly exaggerates the protesters' conduct, in particular Mr. Aguirre's conduct.[4] Rather than demonstrating that the disputed facts do not matter, the INS has made the disputed facts pivotal in this case.

The INS argues, for example, that "[b]ased on the record before the Board, there plainly was substantial evidence to support its determination that respondent's acts . . . constituted serious nonpolitical crimes." Pet.Br. at 42. All of that evidence, however, was from Mr. Aguirre's misinterpreted testimony, and the "record" before the Board on which the INS based its case was fatally flawed.

This Court does not sit as finder of fact in the first instance. Crucial testimony in Mr. Aguirre's hearing was incorrectly interpreted. Due process dictates that this case not proceed to a decision on this record, but rather be remanded for new, accurate merits hearing.

C. Mr. Aguirre Did Not Waive Objection to the Mistranslations and Mistranscriptions.

The INS suggested in its Certiorari Reply Brief, and may repeat here, that Mr. Aguirre could have requested a copy of the tape earlier by filing a request under the

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[4] *See* Pet.Br. 44, n. 18 equating Mr. Aguirre's conduct with that of truck driver Reginald Denny. *See also* Pet.Br.42: "Respondent testified that, on numerous occasions, he would stone, beat with sticks, and bind innocent civilians . . . "

Freedom of Information Act, 5 U.S.C. § 552. Cert.Reply Br. at 1, n. 1. There are several responses to this suggestion:

First, this is not a situation in which "waiver" is an appropriate defense for the government. Mr. Aguirre did not voluntarily or knowingly waive his right to an accurate, fair hearing. Mr. Aguirre must be able to rely on the accuracy of immigration court employees' work, as must this Court. Mr. Aguirre could not "waive" his objections to the inaccuracy of their work until the inaccuracy became known or reasonably should have been discovered.

The INS cannot seriously claim that the significant errors in translation and transcription should have been discovered any earlier than they were.[5] Respondents in immigration court proceedings are not provided the tapes of their hearings. To make that claim would mean that the INS expects all respondents in immigration proceedings to routinely file FOIA requests for the tapes in their cases. That action likely would bring the entire immigration court system to a grinding halt.

Further, filing a FOIA request at any prior stage of these proceedings likely would have been only a theoretical remedy. INS objections to and delays in processing FOIA requests are legendary and have been the source of consideration litigation.[6] Even with the personal and

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[5] As noted in the Statement, no one was aware of the interpreter's errors and omissions, because neither Mr. Aguirre's hearing counsel nor the IJ spoke Spanish and of course the errors and omissions are not revealed in the transcript but only on the hearing tape. Even when Mr. Aguirre's current counsel requested the Solicitor General to obtain the tape, she was not aware of what the tape would reveal.

[6] *See, e.g., Maynard v. CIA*, 986 F.2d 547, 564 (1st Cir. 1993) (INS search not inadequate simply because it took 17 months to locate request); *Cudzich v. U.S. INS*, 886 F. Supp. 101, 106-08 (D.D.C. 1995) (withholding documents under investigation-by-other agency theory); *Buffalo Evening News v. Border Patrol*, 791 F. Supp. 386 (W.D.N.Y. 1992) (upholding extensive redaction on internal, investigatory, and privacy grounds); *U.S. v. Colima-Monge*, 978 F. Supp. 941 (D.Org. 1997) (disclosing documents in deported co-defendant's file over INS' FOIA objections).

urgent intervention of the Assistant to the Solicitor General here, acting upon a request from counsel for Mr. Aguirre after the Solicitor General had filed the Petition for Certiorari with this Court, the INS delayed approximately three weeks in producing the tape.

Fundamental fairness dictates that the INS not be able to rest on any "waiver" claim here when the errors and omissions in the record were caused by their employee, and when they have made this case turn on the pivotal, challenged testimony. Most importantly, the INS cannot proceed to deport Mr. Aguirre to Guatemala when it knows that pivotal facts upon which it bases that deportation may not be true.

D. This Court Has Ordered Remand Pursuant to 28 U.S.C. § 2106 in Analogous Situations.

This Court may vacate the judgment of the Court of Appeals and remand it with directions or require further proceedings as may be just under the circumstances. 28 U.S.C. § 2106. When the record below is conflicting or questionable or insufficient, this Court has not hesitated to remand for a new hearing or trial. *See, Communist Party of the United States v. Subversive Activities Control Board*, 351 U.S. 115, 124-25 (1956). In *Communist Party*, this Court said that it cannot pass upon a record containing challenged testimony but must remand to make certain that the Board bases its findings upon untainted evidence; because the basis for the challenge was not in existence when the proceedings were concluded before the Board, the Board may hold a hearing to ascertain the truth of the

allegations or may assume the truth of the allegations and then reconsider its original determination in light of the record freed from the challenge that now beclouds it. *See also, Willing v. Binenstock*, 302 U.S. 272, 276 (1937) (where facts are not sufficiently disclosed by the record to enable Supreme Court to dispose of an issue, the case must be remanded to the lower court with authority, in its discretion, to take further evidence); *Panama Mail Steamship Company v. Vargas*, 281 U.S. 670, 671-72 (1930) (where evidence is conflicting, the decree below should be vacated and the case remanded to the district court to retry the case if necessary); *see also Wood v. Georgia*, 450 U.S. 261 (1981) (§ 2106 authorizes the Court to remand a case in the interest of justice in light of issues or questions not technically raised below).

The BIA itself has remanded a case to an asylum officer when the record was flawed. *Matter of S – S –*, Int. Dec. 3257 (BIA 1995). In that case, the applicant argued that his asylum interview was flawed and the record of it inadequate due to faulty translation and lack of transcription. Although not conceding the particulars, the BIA agreed that it could not enter a decision on the basis of the record as it was:

> In order to fully and fairly review a decision entered in a case, this Board must have before it the primary evidentiary matters relied upon by the initial adjudicator. For example, in the adjudication of appeals taken in deportation proceedings, the record will normally contain a verbatim transcript of the proceedings below.
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> *Id.*, 1995 BIA LEXIS 22 at *6, footnote omitted.

In this case, the "verbatim" transcript is not verbatim. It does not accurately reflect Mr. Aguirre's testimony, nor the questions he actually was asked. The INS cannot be heard to say that his testimony does not matter. Mr. Aguirre's testimony is the only evidence on which

the INS based its charge that he committed a serious non-political crime. The interests of justice require that this case be remanded for a new merits hearing before the IJ.[7]

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[7] In the alternative. the Court may determine to affirm the Court of Appeals' decision on the merits for the reasons set forth in the remainder of this brief. In its decision, the Court of Appeals ordered the case be remanded to the BIA for further proceedings. Pending at the BIA is Mr. Aguirre's motion to remand for a new hearing by the IJ, for the reasons discussed in Argument I, supra. If this Court affirms the Court of Appeals' decision, the case will go back to the BIA and then, presumably, to the IJ for a new hearing.

There is an additional ground for remand. *See* Op.Cert 20-21, discussing AEDPA § 413(f), amending § 1253(h) to add 1253(h)(3). The INS argues that this section does not apply to Mr. Aguirre's case because the BIA dismissal of the INS's appeal of the IJ's order constituted "final action." Pet.Br.31-32, n. 13. Section 413(f) does apply to this case. The statute refers to "final action," not "final BIA action." The BIA's dismissal is not necessarily final action, as this case well illustrates. *See also, Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987), *quoting Matter of Lok*, 18 I&N Dec. 101, 107 (BIA 1981) (when court reverses BIA's order of deportation, court's order nullifies the BIA order and restores the alien's status).

The INS also is incorrect that § 1253(h)(3) applied only to the "particularly serious crime" bar to withholding, § 1253(h)(2)(B). Section 1253(h)(3) read: "Notwithstanding any other provision of law, ¶ (1) shall not apply to any alien if the Attorney General determines that. . . . (B) the application of ¶ (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." *See Matter of Q – T – M – T –*, Int. Dec. 3300, slip op. at 6 (BIA 1996). On its face, § 1253(h)(3) applied to "any other provision of law," including § 1253(h)(2)(C) as well as § 1253(h)(2)(B).

II. DEFERENCE TO THE INS'S LITIGATION POSITION ON THE STATUTORY STANDARDS FOR AND PROCEDURES FOR DETERMINING "SERIOUS NONPOLITICAL CRIME" IS NOT WARRANTED BECAUSE THE AGENCY NEVER HAS ADOPTED THIS POSITION IN A PRECEDENT DECISION OR REGULATIONS.

The INS urges deference to its interpretation of the statutory standards for assessing the "serious nonpolitical crime" exception to withholding of deportation, 8 U.S.C. § 1253(h)(2)(C). Specifically, the INS says that the persecution to be suffered by a deported refugee is never to be considered in evaluating the serious nonpolitical crime exception.

The INS's position is not entitled to deference. The BIA never has issued a precedent decision on the merits adopting the position the INS now urges; the closest the BIA has come to a precedent decision on this issue is contrary to the INS position; BIA decisions on this and related questions have been conflicting; the Attorney General never has promulgated regulations interpreting the meanings of these terms; and the BIA did not even reach the issue in the case at bar.

A. The Closest the BIA Has Come to A Precedent Decision on the "Balancing" Issue is Contrary to the INS's Position in This Litigation.

In its first reported decision on the application of the "serious nonpolitical crime" exception to withholding of deportation, the BIA looked to the Handbook for "an interpretation of the meaning and application of the terms used in the Protocol." *Matter of Rodriguez-Palma*, 17 I&N Dec. 465, 468 (BIA 1980). *Rodriguez-Palma* was decided soon after passage of the 1980 Refugee Act. Among other things, the Refugee Act added the concept of serious nonpolitical crime to the INA. The Board had to decide whether this Mariel Cuban had committed a

serious nonpolitical crime in Cuba before he came to the United States.

The BIA noted that the Conference Report that accompanied the final version of the Refugee Act indicated that it was Congress' intent that § 12533(h) be construed consistently with the Protocol. 17 I&N Dec. 468. The BIA looked to the Protocol for guidance as to the meaning of the term, but finding none, referred to and quoted from the Handbook's ¶¶ 155 and 156.[8] Paragraph 156 calls for a balance to be struck between the nature of the offense and the degree of persecution feared; if a person has a well-founded fear of very severe persecution, the Handbook says, a crime must be very grave in order to exclude him. 17 I&N Dec. 468. The BIA concluded that *Rodriguez-Palma* had committed a "serious nonpolitical crime" whether it applied a balancing test or simply looked at the nature of the offense. 17 I&N Dec. 469.

Shortly thereafter, the BIA considered the same issue in another Cuban Marielito case, *Matter of Ballester-Garcia*, 17 I&N Dec. 592 (BIA 1980). There, the Board said there were serious reasons to believe the exception applied, "whether the traditional view or the balancing test referred to in *Matter of Rodriguez-Palma* is applied." *Id.* at 596.

To date, *Rodriguez-Palma* and *Ballester-Garcia* are the closest the BIA has come to a precedent decision on the question whether the risk of persecution is considered in applying the serious nonpolitical crime exception. Both cases presented the issue on its facts, *Rodriguez-Palma* referred to the Handbook's balancing test as guidance, and quoted it, and *Ballester-Garcia* cited *Rodriguez-Palma* for the balancing test.

The INS cites *Matter of Rodriguez-Coto*, 19 I&N Dec. 208 (1985) as precedent for its position that the risk of

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[8] Relevant sections of the Handbook are reproduced in Respondent's Appendix, hereto.

persecution should never be considered, but the case is not precedent for the INS's position. First, the case did not even present the serious nonpolitical crime issue. The applicant had committed a crime in the United States and the issue was whether the separate "particularly serious crime" exception applied, 8 U.S.C. § 1253(h)(2)(B). *Id.* at 208, n. 1. Second, the BIA gave several other, fully adequate reasons why relief would be denied before mentioning the balancing test. Then, the BIA noted that even if it were to balance the applicant's crime against the nature of the persecution he claimed he would have faced, his crime would have rendered him ineligible under 8 U.S.C. § 1253(h)(2)(B). Then, in dictum, the BIA said that it did not consider that the interpretations of the phrases "particularly serious crime" and "serious nonpolitical crime" should "vary with the nature of evidence of persecution." *Id.* at 209.

In a one-sentence footnote, devoid of analysis, the BIA dismissed its prior precedent decisions, *Rodriguez-Palma* and *Ballester-Garcia*. *Id.* at 209, n. 2. Although the serious nonpolitical crime exception had been at issue in the earlier cases but was not at issue in *Rodriguez-Coto*, the BIA said, without apparent irony, that it had not found it necessary to resolve the issue in the earlier cases "but do so here." *Id.*

In the five years between *Rodriguez-Palma* and *Rodriguez-Coto*, there had not been any change in the statute, but there had been a change in the underlying politics of these "Marielitos" cases. These cases all resulted from the influx of thousands of Cubans in the Mariel boatlift. The BIA decided *Rodriguez-Coto* in the narrow window between 1984, when the United States and Cuba negotiated an agreement for the return of some 2,746 inadmissible Cubans, and 1985, when Cuba suspended the agreement on commencement of broadcasts by Radio Marti. *See* G. Goodwin-Gill, The Refugee in International Law (2d ed. 1996) 107-08, n. 152. For this reason, the case is sui generis, and its holding regarding

serious nonpolitical crimes has even less precedential value.

Further, three years after *Rodriguez-Coto*, the BIA applied a realistic, totality of the circumstances analysis to a related withholding exception. It held that the burning of cars, destruction of property, and rebel groups' forcible recruiting and disciplining of civilian members do not constitute persecution because they are actions typically within the nature of civil wars. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815-16 (BIA 1988). Other reported BIA decisions also are inconsistent with the unreported decision in this case. For example, the BIA has conceded that violent actions may be the only option for people seeking to change the political structure of their governments. *Matter of Izatula*, 20 I&N Dec. 149, 153-54 (BIA 1990), *citing Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988).

The BIA never has issued a precedent decision supporting the INS's argument herein. Because *Rodriguez-Palma* and *Ballester-Garcia* presented the serious nonpolitical crime issue, they are the closest to a precedent decision. At a minimum, the BIA has been inconsistent in its pronouncements on this exception. The INS litigation position is not entitled to deference. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988) (agency not entitled to deference when its interpretation is presented for the first time as a litigation position).

B. The Attorney General Has Not Issued Regulations Announcing A Position on This Question; Nor Did the BIA Decide this Question in The Case At Bar.

The Attorney General never has issued a regulation or decision forbidding the BIA or IJs from considering the risk of harm an applicant faces in a § 1253(h)(2)(C) case. *See Batanic v. INS*, 12 F.3d 662, 666 (7th Cir, 1993) (it is an agency's exercise of its judgment in a sufficiently authoritative manner that warrants the court's deference; where

there are no regulations or similarly authoritative pronouncements, deference is not warranted). That the Attorney General (and the BIA) have not had occasion to render decisions on this question is reasonable and not surprising. As Mr. Aguirre argued in his Brief in Opposition to Certiorari, cases presenting the serious nonpolitical crime exception to withholding have been almost nonexistent since the early 1980s and will continue to be extremely rare.

In fact, the BIA in this very case did not reach this issue. The decision never mentions balancing or considering the risk or degree of persecution; in fact, it scarcely mentions Mr. Aguirre's fear of being deported to Guatemala. The INS repeatedly asks for deference to "the Attorney General," but tellingly, the INS's brief almost never refers to the BIA decision itself.

It is entirely possible that if Mr. Aguirre's case had proceeded on remand from the Court of Appeals, the BIA would have rejected the "rule" in *Rodriguez-Coto* as the dictum it was, and would have referred to the Handbook for guidance, as it says it does and as it has done in cases both before and after *Rodriguez-Coto*. Considering the risk of harm to Mr. Aguirre if he is deported to Guatemala, the BIA may very well have affirmed the IJ's decision.[9]

[9] Because the BIA has not ruled on this issue and did not consider it in this case, the Court may determine that the Ninth Circuit should have permitted the BIA to decide this issue in the first instance. In that event, it would be appropriate to order a remand to the BIA for it to decide whether the risk and degree of persecution to the applicant is ever relevant in assessing this withholding exception and to apply that decision to Mr. Aguirre's case.

III. THE COURT OF APPEALS AFFORDED THIS BIA DECISION THE APPROPRIATE DEGREE OF DEFERENCE

There are numerous reasons why the BIA's unreported decision in this case is not entitled to heightened deference. First, the BIA has acted inconsistently when applying this and related exceptions. *INS v. Cardoza-Fonseca*, 480 U.S. 421, at 446, n. 30 (1987); *Bowen v. Georgetown University Hospital*, 488 U.S. at 212-213. In addition to the BIA's inconsistent and conflicting precedent on this and related issues, the INS published asylum regulations in 1988 that set forth an interpretation of the serious nonpolitical crime exception that is consistent with the Court of Appeals' decision below. *See* 53 Fed. Reg. 11300-11301 (April 6, 1988).[10] That is, only three years after *Rodriguez-Coto*, the INS directed that, to be consistent with the Convention and Protocol, the serious nonpolitical crime bar was to be applied in asylum cases with full consideration of the totality of circumstances and equities on a case-by-case basis. The INS said:

> [E]vidence of the commission of such non-political crimes will now be a discretionary factor to

[10] The serious nonpolitical crime exception had been in the INS's asylum regulations since 1980; the INS proposed deleting it in 1988 and then deleted it in 1990. The INS deleted this exception "because of serious concerns with respect to the difficulties in determining the validity of allegations of 'serious non-political crimes' committed prior to arrival in the United States." 53 Fed. Reg. 11300-11301. The same bar has been in the withholding statute consistently since 1980. By regulation, every asylum application is also considered to be an application for withholding. *INS v. Stevic*, 467 U.S. 407, 420 n. 13 (1984); 8 CFR 208.3(b). Therefore, the INS's suggestion that the serious nonpolitical crime issue is of greater significance now that the exception has been placed into the asylum statute is not persuasive.

> be considered together with the totality of circumstances and equities on a case-by-case basis consistent with the proper intent of the Refugee Act of 1980 as well as the 1951 U.S. Convention and the 1967 Protocol Relating to the Status of Refugees.

The "equities" in any particular case would include the persecution an applicant faces upon forced return to his or her country. The "totality of the circumstances" would include the political purposes of the act and the political and social conditions in the home country at the time of the alleged crime. The BIA's failure to consider the totality of circumstances and all the equities on a case-by-case basis is precisely why the Court of Appeals reversed the BIA's decision.

The BIA's decision here also is not entitled to deference because it contradicts its own precedent that an IJ's finding regarding the accuracy, reliability, and truthfulness of a witness is given significant deference and ordinarily will not be disturbed.[11]

See also, Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951) (the impartial, experienced examiner who observed the witnesses and lived with the case drew different conclusions than the NLRB); *Marquez v. INS*, 105 F.3d 374, 378 (7th Cir. 1997) ("by laying a coat of confusion on top of the Immigration Judge's more intelligible opinion the BIA undermines our confidence in it.")

Here, without explanation or justification, the BIA disregarded the considered opinion and judgment of the IJ, who heard all the testimony, observed Mr. Aguirre, considered the evidence, and issued a detailed, carefully

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[11] *Matter of Y – B –* , Int. Dec. 3337 (BIA 1998); *Matter of A – S –* , Int. Dec. 3336 (BIA 1998); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987); *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985); *Matter of Boromand*, 17 I&N Dec. 450 (BIA 1980); *Matter of Magana*, 17 I&N Dec. 111, 114 (BIA 1979); *Matter of Teng*, 15 I&N Dec. 516 (BIA 1975). *See also, Garcia v. INS*, 31 F.3d 441, 444-45 (7th Cir. 1994).

considered decision, finding Mr. Aguirre credible and deserving of asylum and withholding. Pet.App. 28a. The Board nowhere contested the IJ's finding that Mr. Aguirre was credible, nor was there any basis on which to contest it. Yet the BIA rejected and recharacterized Mr. Aguirre's testimony. In subtle but significant ways the BIA impugned Mr. Aguirre's credibility without conceding it was doing so or providing any reasonable basis.[12] The BIA implicitly but never explicitly rejected the IJ's finding that no civilians were hurt, that Mr. Aguirre's actions were not criminal but political, and that they were necessary and appropriate in the context of Guatemala in the late 1980s and early 1990s. The BIA's decision does not merit heightened deference. *See Cordero-Trejo v. INS*, 40 F.3d 482, 487 (1st Cir. 1994) (denial of asylum based on negative credibility finding unsupported by the record, reversed).

The BIA's decision here also does not merit heightened deference because it was cursory and poorly reasoned. The INS asks for deference to the "the Attorney General's" undertaking "the context-specific and often sensitive determination of whether an alien who engaged in criminal conduct abroad should be granted safe haven in this country." Pet.Br. at 15. Mr. Aguirre agrees that the Attorney General should undertake a context-specific and sensitive determination of his case, including consideration of his desire for a safe haven. But the BIA did nothing of the kind here. Its entire "consideration" of the merits of his eligibility for withholding was one cursory

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[12] For example, the BIA referred to the government's "seeming inaction" in failing to investigate student deaths and disappearance. There was ample evidence in the record that the Guatemalan government not only did not investigate student deaths and disappearances but also may have been complicit in them. *See also*, Brief of Amici Curiae Massachusetts Law Reform Institute, et al., filed with this Court in this case.

paragraph that said nothing of the context of his actions or his need for a safe haven. Pet.App. 18a.[13]

The INS brief notes that the question whether there are "serious reasons for considering" that certain acts are serious and nonpolitical is largely factual. Pet.Br. at 41. It is true that assessing this question involves applying the facts to the legal standards, but this is precisely what the BIA's decision did not do. The BIA's decision was devoid of factual analysis of whether there are "serious reasons." Tellingly, the INS fails to cite to any place in the BIA decision where the Board considered whether there were "serious reasons" and explained what those "serious reasons" might be.

The BIA decision also is not entitled to deference because the BIA failed to apply its own precedent in

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[13] Numerous circuit court cases have criticized and reversed the BIA for the poor quality of its decision-making and faulty reasoning and analysis. *See Martinez-Benitez v. INS*, 956 F.2d 1053, 1055 (11th Cir. 1992) (reversing BIA for failing to evaluate the nature and underlying circumstances of the applicant's conviction before denying asylum); *Marquez v. INS*, 105 F.3d 374, 378 (7th Cir. 1997) (faulting BIA for disorganization of its opinion and "twisted strands" of reasoning; BIA must announce its decision in terms sufficient to enable a reviewing court to perceive it has heard and thought and not merely reacted); *Espinoza v. INS*, 991 F.2d 1294, 1300-01 (7th Cir. 1993) (BIA's decision rested on nothing but speculation without evidence to support it; the BIA relied on an incomplete record); *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994) (BIA departed significantly from prior unpublished decisions treating the identical issue); *Diaz-Resendiz v. INS*, 960 F.2d 493, 495, 497-98 (5th Cir. 1992) (BIA decision departed from established precedent without a reasoned explanation; BIA failed to consider meaningfully all relevant factors, or sufficiently articulate its reasons); *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995) (the opinions rendered by the INS's judicial officers, including members of the BIA, often flunk minimum standards of adjudicative rationality).

assessing whether any alleged crime was "nonpolitical." Specifically, the BIA did not apply the McMullen and Handbook test.[14] It failed to consider Mr. Aguirre's offenses in relation to his declared political objectives, including whether the acts were committed with genuine political motive rather than for personal gain. The BIA also did not consider whether there was a close and direct causal link between any crime committed and its alleged political purpose and object, nor whether the acts committed were of an "atrocious nature."[15]

As so often, particularly in unreported decisions the BIA failed to consider relevant facts and ignored applicable law.[16]

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[14] *McMullen*, 19 I&N Dec. 90, 97-98 (1984); Handbook ¶ 152. The INS refers to the Handbook as a "foreign" source, Pet.Br. at 16, but this Court has said "the Handbook provides significant guidance." *Cardoza-Fonseca*, 480 U.S. at 439, n. 22. Numerous BIA decisions rely on the Handbook as their authority. Cases just in the last decade in which the BIA majority relied on the Handbook include: *Matter of N – M – A –* , Int. Dec 3368 at 11, 16 (BIA Oct. 21, 1998); *Matter of Y – B –* , Int. Dec. 3337 (BIA 1998); *Matter of S – M – J –* , Int. Dec. 3303 (BIA 1997); *Matter of S – P –* , Int. Dec. 3287 (BIA 1996); *Matter of H –* , Int. Dec. 3276 (BIA 1996); *Matter of R –* , 20 I&N Dec. 621, 625 (BIA 1992); *Matter of Dass*, 20 I&N Dec. 120, 125 (BIA 1989); *Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989); *Matter of Chen*, 20 I&N Dec. 16, 19 (BIA 1989).

[15] The Court of Appeals properly pointed out the BIA's errors, but did not itself make a final determination on Mr. Aguirre's application. The INS is simply wrong when it says that the Court of Appeals expanded the availability of this relief. It did not even approve or direct the approval of Mr. Aguirre's application. All applicants, including Mr. Aguirre, must establish every element of eligibility. Nothing in the Court of Appeals' decision changes that fact.

[16] Many researchers and commentators have criticized the BIA for issuing decisions influenced by politics or foreign policy considerations. *See* U.S. Gen. Accounting Office, *Asylum:*

Uniform Application of Standards Uncertain – Few Denied Applicants Deported 2-4 (1987) (concluding that immigration agencies failed to apply uniform standard in evaluating whether applicant established "well-founded fear of persecution" and that asylum decisions are not always documented); D. Smith, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681, 711-712 (1989) (examining published and unpublished BIA asylum decisions issued between January 1987 and December 1987 and noting the "striking" evidence of "apparent political biases"); K. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279, 384-50 (arguing that evidence exists that executive branch is influenced by President's foreign policy in deciding asylum claims); *Matter of B –* , Int. Dec. 3251 (BIA 1995) (Vacca dissenting) (Afghan mujahidin supporter's asylum story is neither plausible nor believable and was unsupported by sufficient probative evidence; IJ's adverse credibility finding should have been accepted by BIA majority); *Matter of Salim*, 18 I&N Dec. 311, 319 (BIA 1982) (Vacca dissenting) (anticommunist Afghan granted withholding – but not asylum – despite absence of "a single item of probative, objective evidence" to corroborate his story); *ABC v. Thornburgh*, 760 F. Supp. at 799 (stipulated order approving class action settlement agreement, providing for *de novo* asylum adjudication of Salvadoran and Guatemalan class members' applications; Attorney General agreeing that foreign policy considerations are not relevant and should not be considered in determining applications for asylum; and that an individual is from a country whose government the United States supports or with which it has favorable relations is not relevant; nor whether the United States government agrees with the political or ideological beliefs of the individual).

IV. THERE IS A CORRECT STANDARD FOR EVALUATING THE SERIOUS NONPOLITICAL CRIME EXCEPTION, AND THAT STANDARD WAS APPLIED BY THE IJ AND COURT OF APPEALS.

A. *Chevron* Does Not Require Heightened Deference if a Court is Engaged in Pure Statutory Construction.

The judiciary is the final authority on issues of statutory construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984); *Cardoza-Fonseca*, 480 U.S. at 446-47. Although reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, they must not rubber-stamp administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. *Federal Labor Relations Authority v. Aberdeen Proving Ground*, 495 U.S. 409, 414 (1988), (internal quotations and elipses omitted), *citing Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

This Court has long held that courts must strive to interpret domestic legislation in a way that is consistent with international obligations. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Domestic law may supersede international obligations only by express abrogation, *Chew Heong v. United States*, 112 U.S. 536, 538 (1884) or by subsequent legislation that irrevocably conflicts with international obligations. *Reid v. Covert*, 354 U.S. 1, 18 (1957).

Here, the INS's interpretation of the serious nonpolitical crime provision is contrary to the central purposes of the Convention and Protocol, which is to assure that nations not return an alien to a country where his or her life or freedom would be threatened on account of one of the enumerated reasons. *Cardoza-Fonseca*, 480 U.S.

at 429.[17] It is clear from the legislative history of the 1980 Refugee Act that Congress' primary purpose was to bring United States refugee law into conformance with the 1967 Protocol. *Id.* at 436.

Congress has not expressed any intention to renege on the international obligations assumed when it acceded to the 1967 Protocol. To the contrary, since the United States acceded to the Protocol in 1967 and Congress enacted the Refugee Act in 1981, Congress signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[18]

If the meanings of "nonpolitical" or "serious" or "serious reasons" or the other terms in § 1253(h)(2)(C) are not clear on their face, the courts appropriately construe their meanings, employing traditional tools of statutory construction. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 212-13. The task of defining what is a political offense is left to the judiciary. In the *Matter of the Extradition of Francisco Pazienza*, 619 F. Supp. 611, 619 (S.D.N.Y. 1985). In this case, those tools include the words employed by Congress together with such resources as the Convention, Protocol, and Handbook, and the United Nations travaux preparatoires. Also, in this setting, where international law comes into play, the guidance and interpretation of refugee law publicists is helpful.

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[17] *See*, Brief of Amicus Curiae Lawyers Committee for Human Rights and Brief of Amicus Curiae United Nations High Commissioner for Refugees, filed with this Court in this matter.

[18] The Torture Convention was opened for signature on Feb. 4, 1985, G.A. Res. 39/46, 39 UNGAOR Supp. No. 51 at 197 U.N. Doc. A/Res/39/708 (1984), reprinted in 23 I.L.M. 1027 (1984), modified in 24 I.L.M. 535 (1985). The Senate adopted its resolution of advice and consent on October 27, 1990.

B. The Statutory Standards for Analyzing The Serious Nonpolitical Crime Exception Must Be Interpreted Consistently with Congress' Intent in Enacting § 1253(h), That is, To Provide Protection to People Fleeing Prosecution, Not to Reward or Punish.

The unambiguously expressed intent of Congress in enacting § 1253(h) was to conform United States law to the Convention and Protocol, thus assuring that those facing a clear threat to their life or freedom would not be returned to face that threat. *Stevic*, 467 U.S. at 416-17; *Cardoza-Fonseca*, 480 U.S. at 429. Congress' intent also was that refugee determinations not be based on or influenced by ideological, geographical, or foreign policy considerations. *Stevic*, 467 U.S. at 422 (the Refugee Act eliminated the ideological and geographical restrictions on admission of refugees); *see also, ABC v. Thornburgh*, 760 F. Supp. at 799.

Asylum and withholding are "prophylactic protection" for those who might face future persecution. They are "designed not to remedy the past, but to protect those who might suffer future persecution." *In re N – M – A –*, Int. Dec. 3368 (BIA Oct. 21, 1998 at 8, *quoting Marquez v. INS*, 105 F.3d 374 (7th Cir. 1997). In other words, asylum and withholding are not to be used as a reward for favorable behavior nor as a punishment for unfavorable behavior.

A grant of withholding to an eligible person is, of course, mandatory. *Stevic*, 467 U.S. 421, n. 15. The exceptions to the withholding statute are to be treated as exceptions; they should be narrowly construed.[19] As the

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[19] J. Hathaway, *The Law of Refugee Status*, 189 (1991) (because these clauses are to be applied only in relation to persons who otherwise present a prima facie need for protection, they ought reasonably to be strictly construed); Handbook ¶ 149 (considering the serious consequences

INS concedes, the exceptions apply to applicants who already have demonstrated not just that they will be persecuted, but that there is a high likelihood that their life or freedom will be threatened if they are forcibly returned.

The serious nonpolitical crime exception has two purposes: 1) to avoid granting refugee status to persons who might jeopardize the internal security of asylum countries,[20] and; 2) to prevent abuse by fugitives from justice.[21]

The purposes of the exception are not furthered by applying it to deport Mr. Aguirre to Guatemala. Both the IJ and the BIA expressly held that he is a not a terrorist or a danger to the community. Cert.Pet.App. 17a; 30a-31a. He is and has been law-abiding in the United States; he presents no danger to the State of Nevada or the United States.[22] The IJ also expressly found that Mr. Aguirre did not flee Guatemala to escape prosecution. ("There is no evidence of Government investigations, charges, or prosecution.") Cert.Pet.App. 30a.

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exclusion for the person concerned, the interpretation of this and the other exclusion clauses must be restrictive).

[20] Hathaway at 214, Handbook ¶ 51. *See also, Frentescu,* 18 I&N Dec. 244 (BIA 1982) (the most important factor when considerating this exception is whether the applicant will be a danger to the community).

[21] A. Grahl-Madsen, *The Status of Refugees in International Law* 290 (1966); *see also* Hathaway at 221 (Convention Article 1(F)(b) disallows the claims of persons who seek to escape legitimate criminal liability).

[22] That Mr. Aguirre has not committed "arson" or any crime in this country is additional evidence that the actions in which he participated in Guatemala were context-specific and political.

C. In Evaluating a Case Involving a Potential Serious Nonpolitical Crime, the "Serious Reasons" Requirement Applies to Each Element and The INS Carries the Initial Burden Of Proof.

When determining whether the serious nonpolitical crime exception applies, the IJ, the BIA and reviewing courts must separately examine each element of the exception. There must be "serious reasons" to find that each element has been met.[23] That is, there must be serious reasons *for considering* that all the statutory terms have been established and that the exception applies: there must be serious reasons for considering that the applicant *committed* a crime; there must be serious reasons for considering the crime was *serious;* and there must be serious reasons for considering that the crime was *nonpolitical.*

The initial burden of proof regarding each element is on the INS. The INS concedes that a finding that there are "serious reasons for considering" requires that there be probable cause. Pet.Br. at 20, n. 9. The INS must make out a prima facie case that all of the elements of § 1253(h)(2)

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[23] Scholars have questioned whether the serious nonpolitical crime exception should permanently bar a person from admission as a refugee. Grahl-Madsen at 291 and citation therein; Goodwin-Gill at 103. Mr. Aguirre participated in the challenged conduct beginning in 1989, when he was 19 years old. As § 1253(h)(2)(C) makes the bar permanent in United States law, there should be serious reasons for applying it.

A withholding case has many analytical, legal, and ethical similarities to a capital sentencing case. This Court continues to hold that in the selection phase of a capital case, where the sentencer is determining whether to impose a death sentence on an eligible defendant, there is a need for a broad inquiry into all relevant mitigating evidence to allow an individual determination. *Buchanan v. Angelone,* 522 U.S. 269, 139 L.Ed.2d 702, 709 (1998).

are met. *See*, regarding the political offense exception under extradition law, *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986), *citing Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (there must be a showing of probable cause sufficient to justify committing the accused for trial in the requested nation as if the offense had been committed there).

The INS says that the burden is on the applicant to show that the exception does not apply. Placing this burden on the applicant is inconsistent with the mandatory nature of withholding. *INS v. Doherty*, 502 U.S. 314, 332 (1992) (Scalia, concurring and dissenting) (because of the mandatory nature of withholding, the Attorney General's power to deny withholding claims differs significantly from the broader authority to administer discretionary forms of relief, such as asylum and suspension of deportation).

Further, placing the burden of proving the exception does not apply on the applicant – aside from the logical difficulty of proving a negative – also would be inconsistent with the purpose and structure of the withholding statute. The overriding purpose of withholding is to protect people fleeing a near-certainty of death or very serious harm. The applicant is, after all, a person who otherwise would have a perfect claim to withholding of deportation. *See* Grahl-Madsen at 291. The withholding statute was not intended to operate as punishment or retribution.

The withholding provisions are structured so that the § 1253(b)(2) exceptions apply only after § 1253(b)(1) eligibility is considered; they are not a threshold to proving eligibility.[24] Congress could have written these grounds as threshhold exclusions, but did not.

The INS cites 8 CFR 208.16(c)(3) (1995) as placing the burden of proof on the applicant to show this exception

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[24] As the statute says: "(2) Paragraph (1) shall not apply to any alien if. . . . "

does not apply.[25] The regulation says, however: "If the evidence *indicates*" that one or more of the exceptions apply, then the applicant has the burden to prove that the ground does not apply (emphasis added). That is, before the burden shifts to the applicant, the INS must adduce sufficient proof to indicate that each element of the exception applies. *Woodby v. INS*, 385 U.S. 276 (1966).

Any interpretation that placed the burden entirely or initially on the applicant would be inconsistent with the purpose and structure of the statute. A regulation cannot contradict its authorizing statute. *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (regulation conflicting with the statute exempts courts from any obligation to defer to it). For the regulation to be consonant with the statute, the initial burden must be on the INS to establish a prima facie case with respect to each element of the exception.

Where the initial burden is placed is pivotal. The INS did not establish a prima facie case that each element of the serious nonpolitical crime exception applies here. Because the INS did not meet this burden, the exception does not apply. The IJ expressly found, after listening to Mr. Aguirre's testimony, observing him, and reviewing his application and attachments, that none of the elements was established. The IJ found that Mr. Aguirre was not being sought for commission of any "crime" in Guatemala, Cert.Pet.App. 30a; that the actions in which Mr. Aguirre was involved were political, not criminal, and were not "serious" in the context in which they occurred. *Id.* at 30a-31a. If deference to the trier of fact is to mean anything, it is that the burden to show each of the elements was not met by Mr. Aguirre's testimony.

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[25] The INS also cites the current version of the regulation, 8 CFR 208.16(c)(2) (1998). It is essentially identical to the 1995 regulation.

D. The Threat to Life or Freedom the Applicant Faces is Properly Factored Into the Exception When the Adjudicator is "Considering" Whether There Are "Serious Reasons."

When the serious nonpolitical crime exception was drafted into the Convention, the drafters anticipated that the risk of persecution would be considered. The travaux preparatoires provide:

> States which received a request for the extradition of a refugee who had committed a crime of no great consequence from the very government that was likely to persecute him, would be faced with a very difficult decision. On the other hand, States could not be expected to grant asylum to persons committing capital crimes merely because they happened to be exposed at the same time to relatively minor dangers on account of some unimportant political activity. A proper balance must be struck between all the considerations involved.[26]

The travaux preparatoires also document that the delegate from the United States argued in favor of adopting a provision that would permit state discretion to admit or refuse serious criminals, rather than a mandatory exclusion clause. Hathaway at 214, n. 156.

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[26] Hathaway at 224 citing Statement of Mr. Larsen of Denmark, U.N. Doc. A/CONF.2/SR.24, at 13, July 17, 1951. *See also*, Goodwin-Gill at 102 n. 125; 105, n. 138 (the Convention drafters knew "it would be necessary to balance the seriousness of the crime against the degree of inconvenience or persecution feared;" "At the Conference of Plenipotentiaries, the President, Mr. Larsen, said that it would be for the country of refuge to strike a balance between the offences committed and the extent to which the fear of persecution was well-founded.") *See also* briefs of Amici Curiae United Nations High Commissioner for Refugees and Lawyers Committee for Human Rights.

The Handbook's ¶ 156 balancing test thus incorporates and is consistent with the intent of the Convention's drafters. They understood that Article 1(F)(b) would sometimes necessitate a balancing of the risk of persecution against the seriousness of the crime. The Handbook memorializes and explains how that test is to be applied to be consistent with the Convention and Protocol.[27]

Hathaway has described this as perhaps the most important factor when considering the serious nonpolitical crime exception:

> [T]he risks associated with exclusion from refugee status must not outweigh the harm that would be done by returning the claimant to face prosecution or punishment. Even though a claimant may be a serious criminal, it is possible that the heinous nature of the persecution anticipated in her state of origin counters the extradition-derived logic of her return.[28]

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[27] The travaux answer the INS's charge that the Handbook was non-contemporaneous with the Refugee Act. *See also*, Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, INS. ("We assume that Congress was aware of the criteria articulated in the Handbook when it passed the Act in 1980, and that it is appropriate to consider the guidelines in the Handbook as an aid to construction of the Act.") Reprinted in *M – A – v. U.S. INS*, 899 F.2d 304, 321 (4th Cir. 1990).

[28] Hathaway, 227, citing A. Grahl-Madsen at 298 ("if, for political reasons, a person is threatened with certain death, imprisonment for life, serious bodily harm or the like upon his eventual return . . . it would, indeed, seem equitable to recognize him as a refugee, even if he were considered guilty of a truly serious non-political crime.") *See also, Matter of Gonzalez*, 19 I&N Dec. 682, 687 (BIA 1988) ("If, for instance, an individual faced the possibility of death, or torture and inhuman treatment, would we not want to know this before deciding to deny asylum in discretion, even where the individual has

It is not that the seriousness of the crime varies with the likelihood or the degree of persecution. Nor does a past act become more or less political when future risk is considered. Rather, it is simply as the Handbook says, that if the risk of persecution is very high, and the threatened persecution very great, a crime must be very grave in order for United States to expel the refugee from this country. Handbook ¶ 156.[29]

Even among eligible withholding applicants, there is a range of fear and a range of harm that may befall them. The Handbook's standard anticipates this range, by providing that the persecution feared may be less or more severe, and that the balance is to be weighed accordingly. In light of the purposes of the Convention, the Protocol, and the Refugee Act, if the risk of persecution is high enough, disqualification based on a crime that is not very grave is inappropriate. Put in real terms, if a refugee will be forcibly expelled to face death, torture, or severe mistreatment because of his or her political activities, we should ensure that the crime that justifies expulsion was very serious indeed.

The decision-maker applies the balancing in its logical place, in the *consideration* of whether this withholding exception applies at all. This is where the Court of Appeals correctly interpreted and placed the "balancing." As the Court said, "Mr. Aguirre could well be found to be

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committed a particularly serious offense?" Heilman, concurring).

[29] *See also,* Handbook ¶ 169; "A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportonately severe punishment for the military offense . . . [or] if he has a well-founded fear of persecution on these grounds above and beyond the punishment for desertion." *Matter of A – G –* , 19 I&N Dec. 502 (BIA 1987), recognizing this exception if there would be disproportionate or severe punishment upon return, and citing Handbook.

in danger of losing his life if returned to Guatemala and therefore should be excluded for his crimes only 'for the most serious reasons.' " *Citing* Goodwin-Gill at 107, Cert.Pet.App. 7a.

The word "consider" is not defined in the INA, but the dictionary definitions support the view that to "consider" is an active assessment process, requiring the decision-maker to evaluate and apply many factors: "To fix the mind on, with a view to careful examination; to examine; to inspect. To deliberate about and ponder over. To entertain or give heed to." BLACKS LAW DICTIONARY, 6th ed. 1990. Also, "To think carefully about, especially in order to make a decision; contemplate; ponder; to think deliberately or carefully; to reflect." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1997).

The IJ's discretion is most appropriately exercised here, where he or she listens to and observes the witnesses, weighs the evidence and determines whether to apply this exclusion in the applicant's case. Consequently, here heightened deference to the IJ's assessment is most appropriate. And it was here where the BIA rejected the IJ's assessment, without so much as a word of explanation.

It is true that the words "balancing test" are not in the statute.[30] The BIA routinely applies the Handbook's other balancing tests, however, even though the words "balancing test" do not appear in those sections of the statute. Most conspicuously, in interpreting this very exception, the BIA applies the Handbook's ¶ 152 "balancing test" – and did so in this very case – although the statute is equally silent. *See McMullen,* 19 I&N Dec. 90, 97-98 (the political aspect of the offense must outweigh

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[30] The INS argues for a "proportionality" test in applying this exception, although that test is nowhere found in the statute. The courts apply a proportionality test to the political offense exception in extradition cases, just as the Court of Appeals here applied a balancing test to the political offense exception in this refugee context.

its common-law character); Cert.Pet.App.18a "[T]he criminal nature of the respondent's acts *outweigh* their political nature." (Emphasis added). *See also* Handbook ¶ 169 and *Matter of A – G –* , 19 I&N Dec. 502, 506.[31]

Considering the risk of persecution would not be "counting" the persecution twice. Under the INS's framework, the risk of persecution would not be counted even once. The BIA expressly did not reach the question of Mr. Aguirre's statutory eligiblity for withholding and scarcely mentioned his fear that he would be killed if he is expelled to Guatemala.

The IJ had no hesitation in finding that Mr. Aguirre met the high standard of proving a clear probability that his very life was at risk if he were forcibly expelled to Guatemala. Cert.Pet.App. 31a-32a. "Considering" that grave risk in the context of the political, social, and military situation in Guatemala, the IJ found that the activities in which Mr. Aguirre was involved in Guatemala were not sufficiently serious to disqualify him. This finding was, of course, due significant deference, but the BIA's decision disregards it without explanation or justification.

E. There Must Be "Serious Reasons" For Considering That Any Crime Committed Was "Nonpolitical" and "Serious".

This nation's immigration statutes have codified its longstanding policy that individuals should not be excluded on the basis of having committed "political

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[31] The BIA frequently applies balancing tests in other contexts, as a matter of statutory interpretation, although those statutory provisions do not authorize or require a balancing test. *See Matter of Marin*, 16 I&N Dec. 581, 584 (1978) (in considering waiver under former INA § 212(c), BIA balances favorable and unfavorable factors; *Matter of Mendez-Moralez*, Int. Dec. 3272 (BIA 1996) (reaffirming *Marin*, applying balancing test to application for § 212(h) waiver).

offenses." This policy was first codified in our immigration laws in 1875, and continues in force today.[32]

The BIA employs the Handbook's analysis for determining whether a crime is "nonpolitical." *McMullen*, 19 I&N Dec. at 97-98, employing Handbook's ¶ 152 test. Under that analysis, the decision-maker must consider:

> 1) the act's nature and purpose, i.e., whether it was committed from genuine political motives and not merely for personal reasons or gain;
> 2) whether there is a close and direct causal link between the crime committed and its alleged political purpose and object;
> 3) whether the political element outweighs the common-law character.

The INS does not dispute the IJ's finding that Mr. Aguirre's actions in Guatemala were politically motivated. There was no personal gain. There was indeed a close and direct causal link between the demonstrators'

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[32] The Act of March 3, 1875 marked the first time federal law sought to exclude criminals from its borders. That section stated, *inter alia*, "[i]t shall be unlawful for . . . persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political [offenses] or growing out of or the result of such political offenses," to be barred from immigrating to the United States. Act of March 3, 1875, § 5 (18 Stat. 477) reprinted in Laws Applicable to Immigration and Nationality, U.S. Dep't of Justice, 1953, at 209-10. The Act of May 6, 1882 (22 Stat. 58); the Act of March 3, 1891 (26 Stat. 1084); the Act of March 3, 1903 (32 Stat. 1213); the Act of February 20, 1907 (34 Stat. 898); the Act of March 26, 1910 (36 Stat. 263); and the Act of 1917, § 3, 2nd proviso (39 Stat. 874) all contain a similar provision exempting people convicted of "political offenses" from the criminal bar to admission.

Several sections of the current INA exempt those who committed or were convicted of political crimes: §§ 1101(a)(43)(F) (aggravated felony, crime of violence); 1182(a)(2)(A)(i)(1) (crime involving moral turpitude); 1182(a)(2)(B) (multiple criminal convictions).

targeting the buses and shops and the causes for their protests.[33] The IJ found that the criminal nature of the actions did not outweigh their common-law character. The BIA conducted its own balancing and reached a different result, but the BIA's balancing was flawed.

The BIA found that the ES's actions were "disproportionate."[34] Proportionality must be measured in context; here the Board strikingly ignored the context of the ES's protest.[35] The BIA noted the violent "atmosphere" in Guatemala, but instead of incorporating that awareness into its consideration of the conditions in which Mr.

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[33] *See* Amici Curiae brief filed by Massachusetts Law Reform Institute et al. in this case, describing the significance of bus fare increases to students and workers in Guatemala and the practical limitations on nonviolent political expression. The ES's concern was not economic; the bus fare increases caused severe societal disruptions, as would proportionally large increases in a vital service in this country.

[34] The term "disproportionate" is not found in § 1253(h)(2)(C) any more than is the word "balance." But the BIA and courts do consider the proportionality of an act when determining whether the political offense exception applies. *See, Eain v. Wilkes*, 641 F.2d 504, 515 (7th Cir. 1981). The "proportionality" issue connects the "nonpolitical" question with the "serious crime" question. Analytically, a crime does not become less political if it is more serious. It retains its political character even if the use of force was disproportionate to the political goals or if it is "atrocious." But courts have been reluctant to apply the political offense exception if the crime was atrocious or disproportionate, and have seemed to hold that some crimes are too serious to be political. These cases' faulty analysis blurs the line between the "serious" element and the "nonpolitical" element. *See McMullen*, 788 F.2d 596-98; *Eain*, 641 F2d 520-21. The BIA decision in this case suffers from the same defect.

[35] *See* Amici Curiae brief filed in this case by the Massachusetts Law Reform Institute et al., discussing the political and social context in which these protests occurred.

Aguirre found himself, the BIA faulted him for taking actions that were not completely peaceful. Certainly, as the Court of Appeals noted, the demonstrators' actions would be objectionable in this era in the United States, but that is not the correct standard.[36] The withholding statute does not require applicants to be pacifists or to engage only in nonviolent protest. The BIA has conceded, in cases arising in other countries, that violent actions may be the only option for people seeking to change the political structure of their governments. *Matter of Izatula*, 20 I&N Dec. 149, 153-54 (BIA 1990), *citing Dwomoh v. Sava*, 696 F. Supp. 970, 979 (S.D.N.Y. 1988); *Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988) (activities such as burning of cars and the destruction of other property is not persecution of others). The BIA cannot, *sub silentio* or in effect, impose a new standard of nonviolence for withholding applicants.

Neutrality in the refugee context, at least as much as in the extradition context, demands more than that the decision-maker remains uninfluenced by the identity of the requesting country or the country of origin. The decision-maker also must remain neutral on the underlying political conflict in that other country and the "legitimacy" of the political objectives of the dissenters. *See,*

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[36] *See In re Doherty*, 599 F. Supp. 270, 273, n. 2, 275 (S.D.N.Y. 1984) (that violence was used during the commission of a political crime is not dispositive in an extradition case; "at the time of the American Revolution, there were a large number of colonists who. . . . regarded the thought of armed opposition to the Crown as both treasonous and abhorrent," *citing* authorities); *Quinn v. Robinson*, 783 F.2d 776, 808 (9th Cir. 1986) (construing the political offense exception in a subjective and judgmental manner to exclude all violent political conduct of which courts disapprove would necessarily exclude some forms of internal revolutionary conduct and thus run contrary to the exception's fundamental purpose.

Quinn v. Robinson, 783 F.2d 776, 804 (9th Cir. 1986). Extradition law and refugee law will cease to function if particular judges, or the BIA, decide the political offense exception by applying their own political preferences to the internal struggles of refugees or persons fleeing political prosecution. At the same time, a finding that the political offense exception applies does not require or connote any "recognition" or approval of the resisters as a legitimate political group. *Eain v. Wilkes*, 641 F.2d at 515.

The Court of Appeals was correct that in determining "proportionality," it is appropriate to consider such factors as the necessity for the actions and their success.[37] The Court did not make "necessity" and "success" new threshold elements but rather, said they should be considered, in an appropriate case, as part of this equation. If a group repeatedly takes actions that have not been successful to their political goals in previous attempts, their conduct undermines the claim that those actions were necessary to achieve their political goals. In that case, the actions are disproportionate to achieving the political goals, and this fact raises the inference that some other goal existed. In other words, necessity and success are relevant in appropriate cases, but they are not dispositive.

This Court followed this line of analysis in *Ornelas v. Ruiz*, 161 U.S. 502, 510-11 (1896), in determining whether the crimes in that case were nonpolitical. The decisive factor was this statment of a State Department official who reviewed the extradition request:

> "The idea that these acts were perpetrated with bona fide political or revolutionary designs is

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[37] "Where the motivation is genuine, the strategy credible, and the incidental harm tolerable in relation to the goal sincerely pursued, it is reasonable to view the action as more fundamentally political than criminal, and hence to access the refugee claim on its merits." Hathaway at 174, footnotes omitted.

> negatived by the fact that immediately after this occurrence, though no superior armed force of the Mexican government was in the vicinity to hinder their advance into the country, the bandits withdrew with their booty across the river into Texas."

That is, fleeing across the border was not necessary for the goal of fighting the Mexican army, nor would it have been a successful strategy.

The INS's concern that there may be foreign policy implications from a finding that violence was "necessary" in a certain country flatly contradicts the Attorney General's agreement, in conformance with the Convention, Protocol, and Refugee Act, that foreign policy considerations are to play no role in witholding or asylum determinations. *ABC v. Thornburgh*, 760 F. Supp. at 799.[38]

Regrettably, political protest sometimes involves civilians, as here. There is no rule, nor could there be, that protest involving civilians is nonpolitical. The INS attempts to create the appearance that the deciding factor in *Ornelas v. Ruiz* was that there were civilian victims. On the contrary, that the victims were civilians was only one of many factors mentioned by the Court, and it was not pivotal. 161 U.S. at 510-11.

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[38] The INS's suggestion that consideration of the necessity and success of past conduct, as part of a proportionality evaluation in a withholding claim, will incite further violence by others in that country scarcely merits response. The notion assumes that political protesters in distant lands gear their conduct to eventual approval of their eventual petitions for relief of deportation. The further suggestion that the protestors should have burned the buses when they were off duty manifests the INS's insensitivity to the purpose of these protests and the limitations on peaceful protest in Guatemala. *See* brief of Amici Curiae, Massachusetts Law Reform Institute, et al.

This case is easily distinguishable from *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), *cited* by the INS. *Eain* concerned the intentional and purposeful murder of civilians through random bombing. *Id.* at 521. The perpetrators' goal was to cause as much death and destruction to civilians as possible. The bomb was placed in a "teeming market area" of Israel, and apparently no warning was given. *Id.* at 507, 509. The court said:

> "the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger 'political' objective of the person who sets off the bomb may be to eliminate the civilian population of a country." *Id.* at 521.

Here, any actions against civilians were intended to clear them from buses before the buses were burned, thus preventing greater harm.[39] The evidence was uncontroverted that the ES did not target civilians. Their actions were intended to and did prevent injuries to civilians. Cert.Pet.App. 31a (IJ finding that "No one was ever hurt;" AR 93 (Mr. Aguirre explaining that no one was hurt during the bus burnings because the SE would help the people leave the bus before it was burned).

The INA and case law distinguish between "legitimate" political crime and "illegitimate" political crime, that is, terrorism. Both the IJ and BIA expressly rejected the government's argument that Mr. Aguirre's actions constituted terrorism or that he was a danger to the community. Cert.Pet.App. 17a; 31a. By gross and inflammatory exaggerations and unsupported analogy, the INS attempts to resurrect this rejected argument *sub silentio*.

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[39] Further, the Court of Appeals in *Eain* was concerned to prevent terrorists fleeing to this country to avoid having to answer to anyone anywhere for their crimes. *See* 641 F.2d at 520. There is no such concern in this case: Mr. Aguirre was not a terrorist and was not fleeing to avoid prosecution.

The Court of Appeals correctly distinguished this case from *McMullen*. There, the BIA and the Court of Appeals found that McMullen's active participation in terrorist activities directed at civilians was not within the political offense exception. 788 F.2d at 595-596; 19 I&N Dec. 90, 97-99. The PIRA itself was "unquestionably" a terrorist organization. 788 F.2d at 597. McMullen's involvement in the terrorist use of explosives and his participation in the PIRA's campaign of violence randomly directed against civilians were atrocious acts out of proportion to the asserted political goal. *Id.* at 596. He had served three years in prison before he entered the United States, *id.* at 593, and there was an outstanding warrant for McMullen's arrest for attempted murder, among other charges. *McMullen v. United States*, 953 F.2d 761, 763 (2d Cir. 1992) *rev'd on other grounds*, 989 F.2d 603 (2d Cir. en banc 1993).

There Must Be Serious Reasons – Meaning Probable Cause – for Considering That Mr. Aguirre Personally Committed a Crime.

The IJ expressly rejected the INS's argument that Mr. Aguirre was a criminal. He noted that there was no evidence of Guatemalan government investigations, charges, or prosecution of Mr. Aguirre. Pet.App. 30a. The threats against Mr. Aguirre by the government and guerrillas were based upon political grounds, the IJ found. *Id.*

Although one would not know this from reading the INS's brief, in its three-paragraph discussion of this question, the BIA did not say that Mr. Aguirre had committed arson or any specified crime. In fact, the BIA did not accuse Mr. Aguirre of having committed a crime at all. Pet.App. 17a-18a. Nor did the BIA discuss Mr. Aguirre's personal culpability, liability, or mens rea.

Without citing an applicable statute or authority, or pointing to any charge or conviction, and ignoring the IJ's express finding that Mr. Aguirre was not guilty of any crimes, the INS accuses Mr. Aguirre of committing arson

in Guatemala. The INS offers no legal analysis to establish that the elements of the crime of arson were met. *See Mabugat v. U.S. INS*, 937 F.2d 426, 431 (9th Cir. 1991) (witholding applicant "admitting" potentially political crime may not have admitted a "crime" at all, as there was no proof of the mens rea necessary to convict).[40]

Further, there must be serious reasons – probable cause – to believe that Mr. Aguirre personally is guilty of a crime. *See Ornelas v. Ruiz*, 161 U.S. at 512; Goodwin-Gill at 106 (attention must be paid to the level of individual responsibility).[41] Mere membership in a rebel group, even one that engages in persecution, is not sufficient to bar a person from relief as a persecutor. *Rodriguez-Majano*, 19

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[40] Arson was defined at common law as the malicious burning of the house of another. BLACK'S LAW DICTIONARY, 6th ed. The Model Penal Code, § 220.1(1), provides that a person is guilty of arson, a felony of the second degree, if he or she starts a fire or causes an explosion with the purpose of: (a) destroying a building or occupied structure of another; or (b) destroying or damaging any property, whether his own or another's, to collect insurance for such loss. *Id.*

Under Federal law, at 18 U.S.C. § 81, arson is committed by someone within the territorial jurisdiction of the United States who:

> willfully and maliciously sets fire to or burns, or attempts to set fire to or burn any building, structure, or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping.

See United States v. Banks, 368 F. Supp. 1245 (D.S.D. 1973) (for "motor vehicle" to be included within 18 U.S.C. § 81, it would have to be classified as "machinery" but that such classification would raise grave constitutional questions as to vagueness).

[41] Grahl-Madsen emphasized the right of the person subject to the bar to establish his innocence, even in the face of a conviction. Grahl-Madsen at 290.

I&N Dec. at 814-15. It is the effect of the applicant's own actions that is controlling. *Id.*

In this case, all of Mr. Aguirre's pertinent testimony related to the actions of the SE. The BIA did not, of course, address the question of his individual responsibility. Contrast the BIA decision in *McMullen*, where the Board found that McMullen was personally responsible for importing illegal arms shipments and that those guns could be tied directly to the murder, torture, and maiming of civilians. 19 I&N Dec. at 96.

CONCLUSION

The judgment of the Court of Appeals should be affirmed; or the matter should be remanded to the agency for a new merits hearing on Mr. Aguirre's applications for withholding and asylum.

Respectfully submitted,

January 1999

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*For indentification only

APPENDIX

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In re *JUAN ANIBAL AGUIRRE-AGUIRRE,*	)	IN DEPORTATION PROCEEDINGS
Respondent.	)	A 70 815 341
	)	MOTION TO REMAND

Respondent JUAN ANIBAL AGUIRRE-AGUIRRE, by and through counsel undersigned, hereby moves the Board of Immigration Appeals to remand this case to the Immigration Court for a new hearing on his applications for relief from deportation.

BRIEF PROCEDURAL HISTORY OF THIS CASE

Mr. Aguirre's applications for asylum and withholding of deportation were granted by the Immigration Judge (IJ) after a merits hearing on April 5, 1995. The INS appealed. This Board reversed the decision of the IJ in an unpublished decision filed on March 5, 1996.

Mr. Aguirre petitioned for review to the Ninth Circuit Court of Appeals. That Court reversed the decision of the BIA in a reported decision, 121 F.3d 521 (9th Cir. Aug. 8, 1997). The INS sought rehearing; the Court denied the petition for rehearing on November 6, 1997. The INS filed a petition for certioari [sic] in the United States Supreme Court. That petition was granted on October 5, 1998. The case currently is pending before the Supreme Court, docket number 97-1754. The INS filed its opening brief on December 4, 1998.

WHY A NEW MERITS HEARING IS NECESSARY

A new merits hearing is necessary because the interpreter at Mr. Aguirre's original April 5, 1995 merits hearing made crucial errors in interpretation. Those errors have become pivotal in this case. The errors included misinterpreting Mr. Aguirre's answers and also misinterpreting questions put to Mr. Aguirre, so that, unbeknownst to him, he did not answer the questions asked of him.

To addition to the interpreter's errors, the hearing tape transcription is in error in at least one crucial point. Attached to this motion is a corrected transcript, made by a Federal Court certified interpreter who translated both

Mr. Aguirre's and the interpreter's Spanish. The corrected transcript details the errors made by the original interpreter and the transcriber.

Neither the IJ nor counsel for Mr. Aguirre understood Spanish, consequently they did not realize that the interpreter was making these errors.

In the Supreme Court, the INS has focused its case on Mr. Aguirre's purported conduct in Guatemala, particularly regarding political protests and demonstrations. The issue is whether he committed a serious non-political crime in Guatemala. The questions and testimony that were erroneously interpreted bear directly and crucially on this question. However, in its brief to the Supreme Court the INS has not acknowledged nor addressed the errors in the transcript.

Because the interpreter also erred in the interpreting into Spanish the trial attorney's English-language questions to Mr. Aguirre, it is not sufficient simply to issue a corrected transcript of the same tape. A new, corrected transcript will not permit Mr. Aguirre to answer the questions asked. These are questions that can be heard in English on the tape and that appear, as asked, in the transcript. These are not the questions Mr. Aguirre heard and answered, however. Mr. Aguirre heard and answered the interpreter's incorrect questions.

For example, the trial attorney asked:

> "When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?"

AR at 94 (attached hereto).

The words "and throwing rocks and things at people" were not included in the interpreter's question. The interpreter's question to Mr. Aguirre (translated from her Spanish by the Federal interpreter) was:

> "During the burnings of these buses or the fires that you made did you disguise yourselves or did you cover your faces or use some kind of disguise so that you would not be known?"

Consequently, Mr. Aguirre was not aware that the trial attorney thought (and the written transcript says) he had thrown rocks at people, and did not deny that he had done so.[1] Mr. Aguirre's answer, not surprisingly, did not respond to the rock-throwing allegation. He simply said, "Yes, we would cover our faces."

Again, a few minutes later, the trial attorney's question accused him of throwing rocks at people:

> "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?"

AR 94.

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[1] The trial attorney was under the impression that Mr. Aguirre had said he and his compatriots threw rocks at the people because of an uncorrected interpreting error a few minutes before. Because the interpreter thereafter omitted the parts of the trial attorney's questions that alluded to rock-throwing, Mr. Aguirre never was alerted that the people in the courtroom believed he had thrown rocks, and indeed that the transcript includes those allegations.

Again, in posing the question to Mr. Aguirre, the interpreter omitted the words "throw rocks at them" and her question conveyed to Mr. Aguirre an accusation of less violent conduct:

> "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is hitting them with some stick and tying them up with a rope, a lasso?"

Again, the second (and last) opportunity for Mr. Aguirre to deny that he had hit people with rocks was lost because of erroneous interpreting. Mr. Aguirre also may not have perceived the degree of violence he was accused of having committed. His answer was:

> "If they did not try to do anything to us, we would not do anything to them. Because we would explain, for example to the people in the bus, why we were protesting and sometimes they would support us, because we told them it was because of the high fares."[2]

In summary, the hearing interpreter made significant errors of omission and commission. Because this testimony has become pivotal in this case, it is vital that Mr. Aguirre be permitted to understand what he is being accused of and to answer the questions actually asked of him. It is not sufficient, to put it mildly, to deport a person who faces an established threat to his life or freedom when he has not been able to respond to the

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[2] This is the Federal interpreter's corrected interpretation of Mr. Aguirre's answer.

charges against him. Mr. Aguirre's right to due process mandates that a new hearing be held.

CONCLUSION

For the foregoing reasons, and supported by the attached excerpts form the original transcript and the corrected transcript, Mr. Aguirre respectfully moves this Board to remand his case to the IJ for a new merits hearing.

DATED this 14th day of December, 1998.

/s/ Nadine K. Wettstein
NADINE K. WETTSTEIN
Attorney for Mr. Aguirre

CERTIFICATE OF SERVICE

The undersigned hereby affirms that the foregoing Motion to Remand and all attachments were mailed via first class mail, postage prepaid, this 14th day of December, 1998 to the following:

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September 23, 1998

Frank Lorson
Deputy Chief Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: *INS V. AGUIRRE-AGUIRRE*, 97-1754
INS # A 70 815 341

Dear Mr. Lorson:

On behalf of Respondent JUAN ANIBAL AGUIRRE-AGUIRRE, I am lodging with the Court 10 copies of the

attached Affidavit of Certified Court Interpreter. This affidavit responds to the matters Respondent addressed in his Brief in Opposition to the Petition for Certiorari, particularly at footnote 2.

I regret the delay in forwarding this material to the Court. I am serving counsel for the Petitioner with this material today.

In addition, please note my new address and telephone and fax numbers, above. Thank you.

Yours truly,

/s/ Nadine K. Wettstein
Nadine K. Wettstein

CC w/encl: Seth P. Waxman, Solicitor General
Jocelyn M. Wright, Office of Immigration Litigation, Department of Justice

---

AFFIDAVIT OF CERTIFIED COURT INTERPRETER

I, Ron Earnest, do hereby affirm that the following is true and correct, and that the translation that follows is true and accurate to the best of my ability:

I am a professional translator and interpreter who has been certified by the Administrative Office of the United States Court since 1984. I have also been certified to interpret proceedings in the courts of New York, California, and Maryland. I have worked intermittently as a judicial and conference interpreter since 1978. In addition

to working as an independent contractor for the California courts, I have been appointed staff interpreter for the Supreme Court of New York (1982-83), for the United States District Courts for the Southern District of California (1990-92), and for the United States District Courts for the Southern District of New York (1992-93, I left to pursue a law degree). My educational background includes a B.A. from the City College of New York, a Master's degree in Latin American History and Economics from the University of California – Berkeley, and a J.D. from Syracuse University. I am currently a member in good standing of the Maryland State Bar Association, and am licensed to practice law in Maryland.

At the request of Nadine K. Wettstein, Attorney at Law, I reviewed a portion of an immigration hearing tape, and compared the tape to what was purported to be a transcript of that part of the hearing. My instructions were two-fold: to confirm that the transcript reflected the portion of the tape at issue, and to indicate any errors and omissions in the translation into English or Spanish audible on the tape.

My review of the tape and transcript revealed several errors and omissions. I have transcribed some of the hearing tape and indicate where the errors were made. I reviewed only a small portion of the tape; I do not know whether there were additional errors or omissions in other parts of the transcript.

In the following, the original, correct transcript is in regular typeface. The corrected English translation is in

bold. The incorrect transcript is in brackets. Questions or answers incorrectly interpreted are set out in *italics*.

/s/ Ron Earnest
RON EARNEST
Certified Court Interpreter
September 22, 1998

Beginning on page 92 of the Administrative Record (AR), at line 1:

* * *

Direct examination by Mr. Aguirre's then-attorney, Mr. Long:

Q. Are you willing to return to Guatemala?

A. No.

Q. Do you think the government would be able to control those who are threatening you?

The question was incorrectly interpreted to Mr. Aguirre in Spanish as: "Do you think the government that now controls Guatemala could be a threat to you?"

. . . .

Cross examination by the INS Trial Attorney, Mr. Knuck, at AR 93:

A. And were there any people aboard these buses when you did this?

Q. **No, because when we stopped the bus, we would get all the people off, since there were so many, we would throw rocks at it, and then we would get them out.**

[Mr. Aguirre's answer was incorrectly translated into English as: "No because we would stop the bus, help all

the people, uh, get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus."]

Q. To your knowledge, was anyone hurt during any of these bus burnings or stonings?

A. Of the students or the other people?

Q. The other people?

A. No, we would just hit them if they did not want to get off.

Q. How did you hit them? Did you strike them with a club? Or how?

The question was incompletely translated to Mr. Aguirre in Spanish as: "How did you hit them? With a. . . . "

A. **With sticks. Or we would tie them with a lasso like this, we would get them off. But if they obeyed and got off then we would not.**

[Mr. Aguirre's answer was incorrectly translated into English and incorrectly transcribed by the transcriber as: "We would have sticks, you know, to hit them with or we would just tie them with ropes. But if they be, I mean if they hit our, uh, the bus then we get off the bus." The transcriber mistranscribed the word "heed" as "hit" and changed the entire meaning of the end of this testimony.]

Continued cross examination at AR 94:

Q. When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?

The question was incompletely interpreted to Mr. Aguirre as: "During the burnings of these buses or the fires that you made

did you disguise yourselves or did you cover your faces or use some kind of disguise so that you would not be known?" The phrase, "throwing rocks and things at people" was not interpreted to Mr. Aguirre.

A. Yes, we would cover our faces.

Q. And during the times that you burned the buses, you say you also broke windows and other things?

A. **Yes, we broke store windows and took out everything they had.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Yeah, we would break the windows of the stores and we would just take, I mean, um, uh, raid the stores. Taking everything they have."]

Q. So you were, in other words, looting the stores?

A. **We did not steal, we took the people out of the store. Took out what they had set up, threw it on the floor.**

[Mr. Aguirre's answer was incorrectly translated into English as: "No, we did not steal from the stores, we simply took the people out of the stores that were there. And we would throw everything on the floor."]

Q. The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?

The question was incorrectly interpreted to Mr. Aguirre as: "The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is hitting them with some stick and tying them up with a rope, a

lasso?" That is, the words, "throw rocks at them" were not translated.]

A. **If they did not try to do anything to us, we would not do anything to them. Because we would explain, for example to the people in the bus, why we were protesting and sometimes they would support us, because we told them it was because of the high fares.**

[Mr. Aguirre's answer was incorrectly translated into English as: "If they did not try to do anything to us, we would not do anything to them. Because, we would always explain to the people who were there in the buses, for instance, why we were doing these things, because of the high, um, fares that the buses had. Some of them would even, uh, support us.]

Continuing cross examination on AR 95:

Q. I assume that burning the buses and breaking the windows and such things is a crime in Guatemala?

A. **Well, it is not seen as a serious crime but if we were caught we would have to pay, like with jail.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Uh, it doesn't seem to be a crime, but if we are caught we would have to be jailed then."]

Q. So, I would further assume that if the government did know your identify as one of these people in the groups that were burning the buses, that they would come and arrest you and put you in jail?

A. **Well, it would depend on whether the group would allow itself to be arrested. Because one fights with the police; they almost never catch you. But if they caught you, yes.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Only if they catch us, because usually whenever the police come, we always fight the police. And so if when they, uh, catch one of us."]

Q. I guess that's my point, sir, that you were never arrested and jailed, the government didn't know that you were doing these activities? Is that correct?

The question was incorrectly interpreted to Mr. Aguirre as: "Perhaps that is my question, since the government never knew your identify and that you were participating in these activities? Is that correct?

Continuing cross examination on AR 96:

Q. Now, Mr. Aguirre, you mentioned that some people that you identified as guerrillas came to you and asked you to stop your activities. And I assume that those activities were burning buses and breaking windows?

A. **What they wanted was that other groups not compete with them, and get to take over the government.**

[Mr. Aguirre's answer was incorrectly translated as: "What they did not want is another group to make competition for them and have other groups do the things to the government."]

. . . .

Examination by the Immigration Judge, at AR 97:

Q. In your application, you indicate that after leaving Guatemala you became aware of what happened regarding your information that student leaders were going to be killed. Do you understand what I'm talking about?

The interpreter interpreters [sic] this question as: "In your application you indicate that after you came to the United States or after you left Guatemala? (Interpreter then asks for clarification from the Judge: 'That he stopped his activities, what did you say?') In your application that after you left Guatemala you became aware of what happened. Regarding your information that student leaders were going to be killed. Do you understand what I am talking about?"

A. **No. I need for you to explain that better. Because the question confuses me.**

[Mr. Aguirre's answer was translated into English by the interpreter as: "I need to have a better explanation because the question somewhat confuses me." The interpreter's interpretation was mistranscribed by the transcriber as "I didn't have a better explanation."]

Q. After leaving Guatemala did you learn if any student leaders were harmed or killed?

A. **Yes, they killed a student, but not somebody I knew, I just read in the newspaper I bought in California that they had killed a member of the union, then later my friends came here. The other four.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Uh, yes, I learned in California through the news, in the newspaper that I read, that one of our members of the, uh, syndicate, uh, the student syndicate that had been killed, but other members, about four other members, came this way too. They left Guatemala and came this way."]

Re-direct by Mr. Long, at AR 99:

Q. Did they investigate murders in Guatemala?

A. **Not always. When it is a private citizen they almost never investigate.**

[Mr. Aguirre's answer was incorrectly translated into English as: "When it a particular, I mean a private citizen, they very seldom investigate."]

Q. Why would they be after people who break windows if they are not after murderers?

A. **In other words, it is based on what they see at the moment, and they do take those they can capture. And it is easier for them.**

[Mr. Aguirre's answer was incorrectly translated into English as: "They base themselves on what they see at the time and those where they captured and take them. And this is much easier for them."]

Q. You mean they wouldn't come after you if they found out about it later?

A. **After the act? Only if it is extreme. If it is the first time, no, but if I continue and they continue to discover it's me, they would get a court order and like that.**

[Mr. Aguirre's answer was incorrectly translated into English as: "Uh, if it is the first time, uh, they will not, but if they find out that continually I am the person involved then they will get a judicial order and come and get me."]

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* * *

[p. 92] Q. Are you willing to return to Guatemala?

A. No.

Q. Do you think the government would be able to control those who are threatening you?

A. If the government that is there now?

Q. Yes.

A. I will not be able to tell you now, because now I am not well informed as to how the government is doing there now.

Q. You would not be willing to go?

A. No.

MR. LONG TO JUDGE

Q. I have no further questions.

JUDGE TO MR. KNUCK

Q. Mr. Knuck?

A. Thank you, Your Honor.

MR. KNUCK TO MR. AGUIRRE

Q. Mr. Aguirre, you say that you personally burned some buses and broke some windows and things in some of these organized uprising in that you were involved?

A. Yes.

Q. On how many occasions did you burn a bus?

A. Uh, during the time of '89 and '92, all those years, we burned buses.

Q. Okay. And, how many buses do you thing you burned during those three years?

[p. 93] A. Myself or all the association?

Q. Yourself.

A. In our group, about 10, at the time.

Q. And, how would you burn them? Would you splash gasoline on them? Or, exactly how?

A. Yes. We was, uh, just, uh, uh, splashing with gasoline and then burned them and then burn the tires and all.

Q. And, were there any people on board these buses when you did this?

A. No, because we would stop the bus, help all the people, uh, get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus.

Q. To your knowledge, was anyone hurt during any of these bus burnings or stonings?

A. Of the students or the other people?

Q. The other peopl ?

A. No, we just hit them if they did not want to get off the bus.

Q. How did you hit them? Did you strike them with a club? Or, how?

A. We would have sticks, you know, to hit them with or we would just tie them with ropes. But, if they be, I mean if they hit our, uh, bus then we get off the bus.

Q. And, these people who were on the bus were just [p. 94] ordinary citizens of Guatemala?

A. Yes.

Q. And, you say one of the reasons you burned buses was to protest the high prices of the bus fares?

A. Yes.

Q. When you were burning these buses and throwing rocks and things at people did you cover your face with a bandanna or in some other way hide your identity?

A. Yes, we would cover our faces.

Q. And, during the times that you burned the buses, you say you also broke windows and other things?

A. Yeah, we would break the windows of the stores and we would just take, I mean, um, uh, raid the stores. Taking everything they have.

Q. So, you were, in other words, looting the stores?

A. No, we did not steal from the stores, we simply took the people out of the stores that were there. And we would throw everything on the floor.

Q. But you never stole anything?

A. No.

Q. The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?

A. If they did not try to do anything to us, we would [p. 95] not do anything to them. Because, we would always explain to the people who were there in the buses, for instance, why we were doing this and why we were protesting and doing these things, because of the high, um, fares that the buses had. Some of them would even, uh, support us.

Q. I assume that burning the buses and breaking the windows and such things is a crime in Guatemala?

A. Uh, it doesn't seem to be a crime, but if we are caught, we would have to be jailed then.

Q. So, I would further assume that if the government did know your identity as one of these people in the groups that were burning the buses, that they would come and arrest you and put you in jail?

A. Only if they catch us, because usually whenever the police come, we always fight the police. And so if when they, uh, catch one of us.

Q. Are you saying that if the police knew of your identity as one of the people who had, let's say, burned a bus two months ago, they wouldn't come and arrest you?

A. Yes, but, uh, they could not identify us because we were always well covered, well, ah, protected.

Q. I guess that's my point, sir, that you were never arrested and jailed, the government didn't know that you were doing these activities? Is that correct?

A. They have a list of all the students that are in [p. 96] the ministry of education because they get a list of all those who are students and they know who is doing

what. But, within this, uh, long list and large group of students, the police never really knows who is the leader and who is the one who is actively participating in this.

Q. Now, Mr. Aguirre, you mentioned that some people that you identified as guerrillas came to you and asked you to stop your activities. And I assume that those activities were burning buses and breaking windows?

A. What they did not want is another group to make competition for them and have other groups do the things to the government.

Q. So, you were burning the buses that they wanted to burn? Is that right?

A. Yes.

MR. KNUCK TO JUDGE

Q. I have nothing further, Your Honor.

JUDGE TO MR. LONG

Q. Re-direct, Mr. Long?

A. Yes, Your Honor, just a few questions.

Q. Before you do that, let me ask him just one thing, if I might?

A. Sure.

Q. Okay.

JUDGE TO MR. AGUIRRE

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Relevant Paragraphs From the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees

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151. The aim of this exclusion clause is to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime. It also seeks to render due justice to a refugee who has committed a common crime (or crimes) of a less serious nature or has committed a political offence.

152. In determining whether an offence is "non-political" or is, on the contrary, a "political" crime, regard should be given in the first place to its nature and purpose i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain. There should also be a close and direct causal link between the crime committed and its alleged political purpose and object. The political element of the offence should also outweigh its common-law character. This would not be the case if the acts committed are grossly out of proportion to the alleged objective. The political nature of the offence is also more difficult to accept if it involves acts of an atrocious nature.

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155. What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. In some countries the

word "crime" denotes only offences of a serious character. In other countries it may comprise anything from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F *(b)* even if technically referred to as "crimes" in the penal law of the country concerned.

156. In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a *bona fide* refugee.

157. In evaluating the nature of the crime presumed to have been committed, all the relevant factors – including any mitigating circumstances – must be taken into account. It is also necessary to have regard to any aggravating circumstances as, for example, the fact that the applicant may already have a criminal record. The fact that an applicant convicted of a serious non-political crime has already served his sentence or has been granted a pardon or has benefited from an amnesty is also relevant. In the latter case, there is a presumption that the exclusion clause is no longer applicable, unless it

can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.

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169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion.

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